BEVERIDGE & DIAMOND PC

November 4, 2008

MEMORANDUM

TO: Michael Massey, Esq.
Office of the Regional Counsel
U.S. Environmental Protection Agency, Region IX

FROM: Beveridge & Diamond, PC

RE: Response to SFPUC's Anticipated "Due Care" Argument

This memorandum responds to the anticipated argument of the San Francisco Public Utilities Commission ("SFPUC" or the "City") that the U.S. Environmental Protection Agency ("EPA") should not identify it as a potentially responsible party ("PRP") under CERCLA for the contamination of sediments in Yosemite Creek ("Yosemite Creek" or the "Site."). SFPUC, as the owner and operator of the sewer system, is a PRP at Yosemite Creek.[1] It has asserted that it exercised due care in its ownership and operation of the sewer system in the Yosemite Creek drainage basin (the "Basin"), such that CERCLA's third party defense is applicable to insulate it from liability. The City had agreed to submit a showing to EPA in support of its "due care" argument by mid-September 2008, which EPA then extended until October 20; however, as of the date of this memo SFPUC has not done so, nor indicated when it will.

I. DISCUSSION.

Where owners of sewers are alleged to be PRPs, courts typically examine whether CERCLA's third party defense, also known as the "innocent landowner" defense, is applicable. For it to apply, a defendant must establish all of the following elements:

1) that a third party was the sole cause of the release of hazardous substance;
2) that the third party was not the defendant's employee or agent;
3) that the act or omission of the third party causing the release did not occur in connection with a contractual relationship, existing either directly or indirectly, with the defendant;
4) that the defendant exercised due care with respect to the hazardous substance concerned; and

[1] For a more detailed legal discussion of SFPUC's status as a PRP, *see* Beveridge & Diamond's Memorandum to Michael Massey, Environmental Protection Agency, entitled "Potential CERCLA liability for Owners of Sewer Systems" (June 26, 2008). Notably, other cities have been named as leading PRPs at other, larger sediment sites, including Portland, OR (the Portland Harbor Site), Tacoma, WA (the Thea Foss Waterway Site), and Seattle, WA (the Lower Duwamish Waterway Site).

5) that the defendant took precautions against foreseeable acts or omissions of the third party.

See Lincoln Properties, LTD v. Higgins, 823 F.Supp. 1528, 1539-40 (E.D. Cal. 1992); *see also* 42 U.S.C. § 9607(b)(3). The fourth and fifth elements together are often referred to collectively as the "due care" portion of the defense. As in similar cases concerning sewer systems, the critical element of the City's third party defense here is this due care analysis, and thus that is the focus of this memo. *See, e.g., Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669, 682 n.9 (4th Cir. 1995) (the sanitary authority had failed to produce sufficient evidence of "due care," and thus the court found that it did "not need to reach the question of whether the other [elements of the defense] were shown").

At Yosemite Creek, SFPUC cannot establish the due care portion of the third party defense for at least three reasons:

- For some 30 years, the sewer system was designed to and did discharge untreated residential and industrial sewage and stormwater to Yosemite Creek in wet weather situations -- and did so even after nearly 20 years of efforts by the State and federal governments to get the City to improve its system;
- Despite repeated notification by both State and federal regulatory agencies that SFPUC was not in compliance with water quality regulations, SFPUC's regulations allowed discharges of hazardous substances to its sewer system, including the chemicals of concern (the "COCs") at the Site [2] -- and still do so today;
- SFPUC knew that hazardous substances were being discharged to its sewers from industrial facilities in the Basin and took little action to prevent or regulate them.

SFPUC bears the burden of proof to establish CERCLA's third party defense. Since it failed to exercise due care to prevent years of raw industrial sewage discharges to Yosemite Creek via its sewer system, despite years of efforts by regulatory agencies, and did not take precautions against foreseeable acts or omissions by third parties, it cannot meet that burden.

A. The City Did Not Exercise Due Care in its Design of, Maintenance of, or Upgrades to its Sewer System.

Before discussing the sewer system, it is helpful to understand the local environment that it serves. The Yosemite Creek Basin encompasses approximately 1469 acres of the southeast portion of San Francisco. *See Sediment Investigation at Yosemite Creek,* Battelle, (May 5, 2004) ("Battelle (2004)") at 1-3. Prior to the turn of the last century, areas surrounding Yosemite Creek were mainly marshland, wetland or submerged below mean tide level. *Id*. Most of this area was land-filled between 1940 and 1970. By 1950, areas surrounding the creek were heavily

[2] The COCs identified by EPA at the Yosemite Creek site are: PCBs, DDT, Chlordane, Dieldrin, lead, zinc, and mercury. Action Memorandum, Request for a Time-Critical Removal Action at the Yosemite Creek Site, in San Francisco County, California (undated) ("EPA Action Memo") at 3.

utilized for residences, commercial businesses, and small industry. *Id*. The U.S. Navy began ship repair operations at Hunters Point in 1941 and the Navy port was an active center of secondary manufacturing for the shipyard from the 1940's through 1974. For the past 20 years, industrial activities have primarily characterized the area surrounding Yosemite Creek. *Id*.

The original sewer system that was designed and constructed by the SFPUC in the Yosemite Basin directed 100% of all raw, combined sewage to discharge to the San Francisco Bay (the "Bay"). SFPUC began to improve this system in the 1950's, but, as detailed below, its efforts have been exceedingly slow and insufficient. Despite efforts by State and federal agencies to stop the City from discharging raw sewage including hazardous substances to the Bay, it took SFPUC some 20 years to construct improvements to address the untreated discharges to Yosemite Creek. And the solution that was finally implemented was only a partial one: SFPUC has maintained -- and still maintains -- a sewer system designed to allow untreated sewage to discharge directly into Yosemite Creek during certain wet weather events.

1. 1909-1957: 100% of Raw Sewage Discharged to Yosemite Creek.

The sewer system that supports Yosemite Basin was first built in 1909 and it has always been owned and maintained by SFPUC. The area is served by a combined sewer system that collects both sanitary and industrial sewage and stormwater in the same pipes. *See* Letter from Tommy T. Moala, Assistant General Manager, Wastewater Enterprise, SFPUC, to Chris Reiner, EPA, dated April 11, 2008 ("Moala Letter"). Until 1957, 100% of the combined residential and industrial sewage and the stormwater flows in the Basin -- *i.e.*, during both dry and wet weather and without any treatment at all -- were discharged directly into either Yosemite Creek or South Basin. *See id; see also* Letter from Elaine M. O'Neil, Deputy City Attorney, City & County of San Francisco, to Nicholas W. van Aelstyn, dated Sept. 19, 2008 ("O'Neil Letter") at 1-2. Thus, for at least ten years after the significant build-up of industry in the area (see above), and with the industrial sewage generated by this industry, 100% of the raw industrial sewage generated in this industrial area was discharged directly into Yosemite Creek.

2. 1957-1987: Raw Sewage Discharged to Yosemite Creek During Virtually Any Wet Weather.

Beginning in 1955 and continuing through 1965, the City implemented a major reconfiguration of the Basin's sewer system. In 1955 the Hunters Point sewer tunnel was constructed to transport sewer flows from this area to the Southeast Treatment Plant, though it did not become fully utilized until 1957 when the Yosemite Pump Station was constructed; the Griffith Pump Station also was constructed at some point between 1957 and 1962.[3] The Palou Outfall that had discharged into South Basin was closed in 1962, though usage had already declined significantly by 1959 when the Griffith Street Outfall was constructed. The Griffith Street Outfall joined two other combined sewage outfalls ("CSOs") that discharged directly into

[3] As noted, the City states that the Yosemite Pump Station began operation in 1957, though Battelle states that it began operating in 1959. Battelle (2004) at 1-3. Similarly conflicting dates have been noted for the Griffith Pump Station.

Yosemite Creek: CSO 41, located at the end of Yosemite Avenue and at the head of Yosemite Creek, and CSO 42, located near Fitch Street, close to the mouth of the creek on the southern shore. The Griffith Street Outfall, also known as CSO 40, is located near the end of Griffith Street near the middle of the creek on the northern shore. *See* O'Neil Letter at 1-2*;* Battelle (2004) at 1-9.[4]

By 1962 or 1965, all dry weather combined sewage and stormwater flows in the Basin were routed through the Hunter's Point Tunnel for treatment at the Southeast Treatment Plant. *See* O'Neil Letter at 2; Battelle (2004) at 1-9. However, during wet weather events the tunnel's capacity was exceeded, and untreated excess sewage flows were diverted to discharge directly into Yosemite Creek. *Id*. These overflows of raw combined residential and industrial sewage and stormwater occurred whenever precipitation exceeded only 0.02 inches per hour. *See* Moala Letter; O'Neil Letter at 2-3; RWQCB Res. No. 70-3 (Exhibit A) at 1. These overflow events occurred on a Citywide basis an average of 82 times per year, though the City's computer modeling in 1983 indicates that such overflows into Yosemite Creek occurred an average of 46 times per year. *See* O'Neil Letter at 3. These wet weather discharges of untreated combined sewage into Yosemite Creek -- whether 46 or 82 times per year -- were the norm for at least 30 years, from 1957 through 1987 (O'Neil) or 1990 (Battelle) when the current system was constructed.

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[4] CSO 41 at the head of Yosemite Creek "discharged the greatest volume from the Basin." Battelle (2004) at 1-9. Indeed, according to Resolution No. 70-3 of the California Regional Water Quality Control Board for the San Francisco Bay Region (the "RWQCB") (January 29, 1970) (Exhibit A), the peak flow from this CSO at the head of Yosemite Street was 590 mgd (million gallons per day) -- nearly ***four times*** the peak flow from the Griffith Street CSO, which was 190 mgd. *See id.* at 1. The one study of the creek's hydrodynamics states that, "Negligible sediment deposition occurs at the furthest end of the canal because of the weak current in this ***dead-end area***." *Hydrodynamic Modeling, Wave Analysis and Sedimentation Evaluation for the Yosemite Canal Wetlands Restoration Project; San Francisco, CA*, Noble Consultants, Inc. (September 2005) ("Noble") at 5-4 (emphasis added). It also states that the tidal currents in the canal are "weak"; indeed, "maximum current velocity is approximately 0.25 meters per second, which occurs in the middle and lower canal . . . during the strongest flood and ebb tides," which velocities "are considered low, and not likely to induce noticeable re-suspension of bed material or bed scouring." *Id.* at 4-2. In addition, only "minor scouring occurs in most of Yosemite Creek" with the upper portion having the least, *id.* at 5-5, and the wave climate is mild. *See id.* at 6-3. As detailed in Battelle (2004), the greatest concentrations of contaminants in the sediments are generally located in the in the area at the head of the creek -- where currents are weak, where sediment deposition and re-suspension is "negligible," and where CSO 41 was discharging four times the volume of raw sewage from this industrial area than was CSO 40. Note also that Buckeye Properties, still the site of significant and unsightly industrial operations, lies on the southern shore of the creek immediately adjacent to this area of the creek, and the northern shore was formerly the site of a large auto salvage yard.

3. 1987-Present: Discharges of Raw Sewage to Yosemite Creek Reduced to a Long Term Average of 1 per Year.

The City's construction of transport/storage boxes along the City's edge, which are designed to capture most of the overflow discharges from the sewer system during precipitation events and prevent the discharges from entering the Bay, finally reached the Yosemite Creek Basin in 1987. O'Neil Letter at 2.[5] In 1987 or 1990, a transport/storage box designed to contain wet weather flows from Yosemite Basin went into operation and the Yosemite Pump Station was closed. *See* O'Neil Letter at Exhibit C; Battelle (2004) at 1-9. According to the City, this has reduced the number of storm-event sewage discharges to Yosemite Creek from an average of either 82 or 46 per year (see above) to "a long term average of 1 per year." O'Neil Letter at 2. "By 1991, the combined sewer collection system had reached its current configuration." Battelle (2004) at 1-9.

4. The City Delayed Improvements to its Sewer System Despite Decades of State & Federal Efforts to Get it to Stop Discharging Combined Raw Sewage to the Bay.

The RWQCB began regulating the City's sewer discharges to the Bay at least as early as 1951. *See* RWQCB Res. No 69-43 (September 25, 1969) (Exhibit B) (*citing* "Resolutions Nos. 84 and 718 in December 1951 and January 1966, respectively, to prescribe requirements for [discharges to the Bay]"). Beginning in the mid-1960's, the RWQCB began what would become a decades-long campaign to get the City to comply with waste discharge and receiving water requirements by reducing its discharges of raw sewage to the Bay.

In 1967, the RWQCB ordered the City to "study and develop a masterplan for facilities needed to regulate the quality of wastes discharging from its combined sewerage systems." RWQCB Res. No. 68-77 (December 18, 1968) at 1 (Exhibit C) (*citing* RWQCB Res. No. 67-64 (December 21, 1967)). Among other objectives, the masterplan was to "provide for the treatment and disposal of wet weather flows." RWQCB Res. No. 70-3 (Exhibit A) at 2 (*citing* RWQCB Res. No. 68-77).

In 1968, the RWQCB ordered the City to complete its sewer upgrade improvements to address these wet weather discharges of raw sewage by ***August 1, 1971***. RWQCB Res. No. 68-77 (Exhibit C) at 2. This 1971 deadline was the first of many that the City would miss over the next 20 years.

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[5] Battelle (2004) states that this transport/storage box "went into operation in 1990, followed in 1991 by an additional transport/storage box for the adjacent Sunnydale basin." *Id.* at 1-9. SFPUC's 25 year capital improvement and construction campaign that began in the 1980's apparently is still underway, and the City is currently developing a new Wastewater Master Plan to update the 1974 plan. *See* www.sfsewers.org.

In 1969, the RWQCB's efforts to stop the City from discharging raw sewage to the Bay during wet weather culminated in a series of Cease and Desist Orders to the City for violations of State and federal water quality standards. *See, e.g.*, RWQCB Order No. 72-91 (October 26, 1972) (Exhibit D) at 1 (*citing* RWQCB Res. No. 69-53 (October 23, 1969) and RWQCB Order No. 70-1 (March 14, 1970)).[6] That same year the RWQCB also required the City to "submit a preliminary engineering report and cost estimates for facilities needed to achieve ranges of quality limits for several criteria." RWQCB Res. No. 70-3 (Exhibit A) at 2 (*citing* RWQCB Res. Nos. 69-43 and 69-44).

In 1972, having missed the RWQCB's 1971 deadline for completing the construction of sewer upgrades, the City requested an extension until the end of 1977. The RWQCB rejected that request, explaining that

> ***There is an urgent need for the City and County of San Francisco to comply with present requirements. . . . December 1977 is not an adequate date for meeting present waste discharge requirements and the Board finds that the City and County of San Francisco will have to accelerate construction of facilities necessary to meet present requirements in accordance with a time schedule hereinafter prescribed.***

RWQCB Order No. 72-91 (Exhibit D) at 2 (emphasis added). The Board then ordered the City to complete construction of the sewer system upgrades by July 1, 1974, and to demonstrate compliance by August 1, 1974. *See id.* at 3.

That same year, 1972, Congress adopted the federal Clean Water Act (the "CWA"). Under the authority of the CWA, the newly-established EPA joined the State's efforts to stop the City from discharging raw sewage to the Bay by issuing a mandate to the City under the CWA to improve its sewer system. *See* Battelle (2004) at 1-9; EPA Action Memo at 3.[7] Yet still the City repeatedly delayed structural upgrades to the sewer system to prevent discharges of untreated waste into Yosemite Creek.

In 1973, the RWQCB relented somewhat, acknowledging that the City would not meet the 1974 deadlines any more than it had the 1971 deadline. It then extended the deadline by which the City was to "[d]emonstrate compliance with all requirements" to September 1, 1977. Order No. 73-2 (January 11, 1973) at 3 (Exhibit E).

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[6] We have included only a selection of RWQCB Orders that relate to the Southeastern portion of the City. In fact, the RWQCB issued many more such orders to the City concerning other, similarly deficient aspects of its sewer system. *See, e.g.*, RWQCB Res. No. 69-52 (Oct. 23, 1969); RWQCB Order No. 72-90 (Oct. 26, 1972); RWQCB Order No. 73-1 (Jan. 11, 1973); RWQCB Order No. 73-35 (June 26, 1973); RWQCB Order No. 73-54 (Sept. 25, 1973).

[7] Our research has turned-up many references to these EPA mandates to the City in the early 1970's but not the documents themselves. We have filed a Public Records Act request with the City in an effort to obtain copies of these EPA orders.

In 1974, largely in response to these efforts by the State and federal governments, the City adopted a Wastewater Master Plan, which is set forth as Chapter V of the Final Environmental Impact Report & Statement; San Francisco Wastewater Master Plan; May 1974, (jointly prepared by EPA and the City) ("EIR&S") (excerpts included in Exhibit F) (*see id.* at 67-72 for a chronology of the Master Plan's development). In the section of its Summary entitled "The Problem," the EIR&S states that

> the discharge of untreated combined wastewaters is a definite health hazard and is aesthetically unacceptable. Therefore, the combined wastewaters of San Francisco must be treated prior to discharge to the aquatic environment. . . . ***[D]uring most rainy periods the 340 mgd combined hydraulic capacity of these three [sewage treatment] plants is exceeded, resulting in untreated wastewater being discharged from the collection system at 41 overflow structures located around the periphery of the City*** . . . . [This system is] not adequate to meet the present State requirements or the provisions of the 1972 Amendments to the Federal Water Pollution Control Act.

Id. at 1-2 (emphasis added); *see also id.* at 61 ("***These wet weather discharges will not comply with present receiving water standards of the Regional Board.***") (emphasis added). The EIR&S also noted that, "[u]nfortunately, the Master Plan" will result in "[d]elay in solving the City's wastewater problems." *Id*. at 8.

Though it acknowledged that State and federal law required the City to implement the first stage of the Master Plan (secondary treatment of dry weather flows) by the 1977 deadline, the EIR&S stated that the City "intends" to come into compliance by January 1, 1980. *Id*. at 4.

Just as it had failed to meet the 1971, 1974 and 1977 deadlines, the City also failed to come into compliance by the Wastewater Master Plan's extended date of 1980. Indeed, the City did not even begin to address the problem of raw sewage overflow discharges in the Basin for another seven year beyond that deadline. It was in 1987 that the City finally undertook a 25 year capital improvement and construction campaign pursuant to the 1974 Wastewater Master Plan. O'Neil Letter at 2. Whether this project was finally completed in 1987 (O'Neil Letter) or in 1991 (Battelle), it was some 20 years after the RWQCB had first ordered the City to address the problem -- and nearly 20 years after the original deadline for completing these improvements. And still the design of the City's current sewer system allows wet weather overflows of raw sewage to discharge into Yosemite Creek on average of once per year. *See* O'Neil Letter at 2. It is difficult to conceive how such a record delay, blown deadlines, and repeated defiance of RWQCB and EPA mandates could constitute due care.

B. The City's Regulations Allow Discharges of PCBs, Heavy Metals and Pesticides Into the Sewer System.

Courts addressing the question of whether CERCLA's third party defense applies to insulate owners of sewers have considered whether regulations were enacted to prohibit industrial discharges to sewers. *See Westfarm Associates Limited Partnership v. Washington Suburban Sanitary Commission*, 66 F.3d 669 (4th Cir. 1995); *Lincoln Properties*, 823 F.Supp. at 1539-44. In *Westfarm*, the Fourth Circuit found that defendant's regulations permitted

discharges of toxic organics and other hazardous substances and it was aware of cracks in its sewer and did not take precautions against the foreseeable result that hazardous substances such as PCE would be discharged into the sewer. The Court concluded, "[defendant] had the power to abate the foreseeable release of PCE, yet failed to exercise that power. In light of such failure, we cannot find that any genuine dispute was created that [defendant] exercised due care or took precautions against the foreseeable acts of third parties such as would have entitled it to the 'innocent landowner' defense." *Id*. at 683.

Similarly, at Yosemite Creek, the City had the power to abate the foreseeable release of COCs to Yosemite Creek, but failed to exercise that power even after repeated mandates from both State and federal government to come into compliance with water quality standards. Notably, the City's regulations have never prohibited discharges into its sewers of PCBs, pesticides, or heavy metals that are the Yosemite Creek COCs. Prior to the passage of the CWA, the City had very few regulations governing the discharges of industrial waste into its sewers. These early regulations only prohibited the discharge of substances that would obstruct or injure the system or would raise the temperature above 150°F, or that contained certain percentages of grease, fat or oil, or flammable or explosive substances, and waters with certain pH levels and biochemical oxygen demand levels. *See* Article 4, Section 126 of the Public Works Code (1959) (Exhibit G). In 1971, likely in response to the RWQCB's orders and in anticipation of the CWA, the City adopted Ordinance 15-71 (Exhibit H), which added Article 4.1 (the "Industrial Waste Ordinance") to the Public Works Code. However, the Industrial Waste Ordinance made few changes to the regulations already in place,[8] and discharges of the Yosemite Creek COCs into the sewers continued to be permitted.

It was not until 1976 that the City specifically addressed heavy metals in its regulations. *See* DPW Order No. 104,407 (March 3, 1976) (Exhibit J). Even then, however, the requirements were only that facilities discharging "significant amounts" must complete, "where practicable," "improvements in housekeeping and process that will minimize or eliminate the discharges." *Id*. The term "significant amounts" was not defined, nor was guidance provided as to what "improvements in housekeeping or process" would be deemed "practicable." In 1977 the City enacted Ordinance No. 199-77 (Exhibit K), which further amended the Industrial Waste Ordinance, but still did not prohibit discharges of hazardous substances into the sewers. *See* S.F. Municip. Code § 123(a) and (b) (1997) (available at http://www.municode.com/Resources/gateway.asp?pid=14142&sid=5).

In 1991, more than 20 years after the RWQCB began ordering the City to comply with the State water quality standards, the City for the first time enacted numerical limits for heavy metals, including ones for the Yosemite Creek COCs -- though it continued to permit discharges of hazardous substances into the sewers. DPW Order No. 158,170 (1991) (Exhibit L) states that

[8] Additional numerical limitations were placed on discharges for phenols, dissolved sulfides, turbidity and toxicity. *See* S.F. Municip. Code (1973) § 122 (Exhibit I). The pH limit was changed to 5.5 min (from 5.0) and 8.5 max (from 9.0), and the maximum temperature of discharges lowered to 125°F. The Industrial Waste Ordinance also imposed a fee schedule for certain discharges. *See id.* at § 122.3.

a 24 hour composite sample of wastewater discharge at the point of discharge into the sewer system shall not exceed the following limits for the three heavy metal COCs: lead (1.5 mg/l), mercury (0.05 mg/l), and zinc (23.0 mg/l). The Order does not address pesticides or PCBs.[9] The current Industrial Waste Ordinance, last amended in 1997, also permits the discharge of heavy metals into sewers, subject to certain limitations. S.F. Municip. Code, Article 4.1 (1997).

As in *Westfarm*, the City's local regulations allow discharges of hazardous substances into the sewer system. The City's regulations were slow to evolve, despite the fact that by 1950 the Yosemite Basin was heavily industrialized and discharges into the City's sewers were foreseeable. Moreover, after years of State and federal efforts to get the City to comply with receiving water standards that dated back as far as 1951, in the late 1960's the State began issuing a series of orders to the City to compel the City to improve the Southeast sewer system. *See* Section A.4 above; *see also* EIR&S (Exhibit F) at 67-72. In view of this history, it is clear that the City has not taken precautions against foreseeable acts or omissions of third parties and neither the City's past nor its current regulations satisfy the due care standard for the third-party defense.

C. SFPUC Failed to Take Precautions Against Foreseeable Acts of Third Parties.

In *Westfarm*, the Fourth Circuit found that defendant failed to meet its burden with regard to the "due care" element of CERCLA's third party defense, finding that it knew from inspecting a dry cleaning facility that the facility had used PCE and knew that it poured hazardous substances into the sewer. *Id.* Similarly, in Yosemite Creek SFPUC was aware that industrial users likely were discharging hazardous substances into its sewers. Though portions of the system were built in 1909, predating much of the industrial development in the area, by the time SFPUC began reconfiguring the sewer system in 1955 the area around Yosemite Creek was heavily utilized by industry and the Navy had been operating at Hunters Point for some 15 years. SFPUC nonetheless installed a new sewer system that directed untreated overflows of industrial sewage into Yosemite Creek during wet weather flows. It clearly was foreseeable that this design would result in industrial wastes being deposited at the Site.

Records of the San Francisco Department of Public Works ("SFDPW") show that as early as the 1960's and 1970's, it was actively inspecting industrial facilities in the area of Yosemite Creek and knew that heavy metals, including lead, mercury, and zinc, were being discharged into its sewers from industrial facilities in the Yosemite Creek Basin such as Bay Area Drum. *See e.g.,* Waste Discharge Report Worksheet, December 27, 1972 (Exhibit M); Industrial Waste Sampling Results, June 3, 1980 (Exhibit N). It is unclear what the response of

[9] The City may argue that discharges to sewers were heavily regulated earlier by national pretreatment requirements, pursuant to the CWA. *See, e.g.,* 33 U.S.C. § 1342; 40 C.F.R. § 403.5(c); 40 C.F.R. § 403.8(f)(4). However, pretreatment requirements were not imposed by EPA until 1978, more than 25 years after the industrialization of the Yosemite Creek Basin, and long after industries had begun discharging industrial waste into the sewers.

SFDPW and SFPUC was to sampling results such as these, though in the case of Bay Area Drum there is no indication that the discharges stopped, for it continued its same operations for many more years.

The City investigated other facilities in the Basin besides Bay Area Drum. For example, the Battelle (2004) Report notes that Gonzales Bucket & Drum ("GB&D") has been in operation since 1977 and that its current waste inventory included heavy metals and solvents. Battelle Report (2004) at 1-12. It also states that, "In response to an administrative order from the City, GB&D installed a pretreatment system in 1982 to neutralize the pH and remove metals from wastewater prior to discharging to the sewer," and a "1989 DTSC inspection report indicated that the facility discharged liquid hazardous waste (based on pH) into the sewer without a permit." *Id*. As we've noted in other information provided to EPA, there are numerous industrial facilities in the Basin that have been the subject of various environmental enforcement actions, and doubtless many of them have discharged COCs to the sewers in the Basin.

These two examples of City investigations -- and there likely are many more -- demonstrate that the City was well aware that hazardous substances were being discharged into its sewer system in the Yosemite Basin. The City had knowledge of releases, operated the sewer lines at issue, and had "authority to control the cause of the contamination at the time the hazardous substances were released into the environment." *Lincoln Properties*, 823 F.Supp. at 1534. Yet for decades the City did nothing to reduce or prevent such discharges from reaching Yosemite Creek. Thus, the third party defense is inapplicable to the City at this site.

II. CONCLUSION.

As noted, the law is clear that the City is a PRP at the Yosemite Creek site. The record set forth above makes clear that the City cannot establish CERCLA's third party defense at this site. In particular, SFPUC cannot establish that it exercised due care and took precautions against foreseeable acts or omissions of third parties. SFPUC knew that several of the industrial businesses in the Yosemite Creek Basin were discharging hazardous substances, including heavy metals, into its sewers. Not only was the City aware of it, its own regulations permitted industrial facilities to discharge certain levels of these contaminants into its sewers. Nonetheless, the City designed its sewer system to release this raw industrial sewage into the Yosemite Creek whenever it rained -- and maintained this system for at least 20 years after being repeatedly ordered to construct improvements in order to comply with State and federal law. Thus, as with the City of Portland, Oregon at the Portland Harbor Site, the City of Tacoma, Washington at the Thea Foss Waterway Site, and the City of Seattle, Washington at the Lower Duwamish Waterway Site -- all of which are EPA-lead sediment sites similar to Yosemite Creek except in size (all are much larger) -- EPA here should name the City as a PRP at the Yosemite Creek Site.